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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

BORDEN'S FARM PRODUCTS COMPANY, INC.,

Plaintiff,

against

CHARLES H. BALDWIN, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, KENNETH F. FEE, AS DIRECTOR OF THE DIVISION OF MILK CONTROL OF THE DEPARTMENT OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, JOHN J. BENNETT, JR., AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, WILLIAM C. DODGE, AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK, WILLIAM F. X. GEOGHAN, AS DISTRICT ATTORNEY OF THE COUNTY OF KINGS, SAMUEL J. FOLEY, AS DISTRICT ATTORNEY OF THE COUNTY OF BRONX, CHARLES S. COLDEN, AS DISTRICT ATTORNEY OF THE COUNTY OF QUEENS, AND THOMAS J. WALSH, AS DISTRICT ATTORNEY OF THE COUNTY OF RICHMOND,

Defendants.

STATEMENT OF BASIS UPON WHICH PLAINTIFF CONTENDS THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION UPON APPEAL TO REVIEW THE DECREE APPEALED FROM, AS REQUIRED BY SUPREME COURT RULE 12.

Filed July 17, 1934.

Pursuant to Supreme Court Rule 12, paragraph 1, Borden's Farm Products Company, Inc., the plaintiff in

the above entitled cause, files this its statement showing the basis upon which it contends that the Supreme Court of the United States has jurisdiction upon appeal to review the decree appealed from herein, as follows:

I.

The statutory provisions believed to sustain appellate jurisdiction are Section 345 of Title 28 of the United States Code (Judicial Code, Section 238, amended) and Section 380 of Title 28 of the United States Code (Judicial Code, Section 266, amended.)

II.

The statute of the State of New York, the validity of which is involved in this cause, is Chapter 126 of the Laws of 1934 of the State of New York (not yet officially compiled) which adds a new Article 21 and a new Article 21-A to the Agriculture and Markets Law of said State, being Chapter 69 of the Consolidated Laws of said State. The said statute provides for the regulation of the purchase, sale and distribution of milk in the State of New York, and requires that the defendant Commissioner of Agriculture and Markets fix the minimum prices at which milk may be purchased and sold in said State. The only part of said statute the validity of which is involved in this cause is the last sentence of Section 258 (q) which reads as follows:

> "* * * It shall not be unlawful for any milk dealer who since April tenth, nineteen hundred thirty-three has been engaged continuously in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, and such lower price shall also

apply on sales from stores to consumers; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed for such sales to stores in such a city."

The orders adopted by the defendant Commissioner of Agriculture and Markets, the validity of which is involved in this cause, are Official Order No. 12 designating the plaintiff and certain other milk dealers as having well advertised trade names for the purposes of the section of the statute above quoted, and Official Order No. 35, as amended by Official Order No. 59, fixing the minimum prices for the sale of fluid milk in bottles to stores and from stores to consumers in the City of New York and substantially incorporating the provisions of the section of the statute above quoted.

III.

The decree appealed from was made on the 5th day of July, 1934.

IV.

The application for appeal was presented on the 12th day of July, 1934.

V.

This action was instituted to restrain the defendants in their respective official capacities from enforcing the provisions of the section of the statute above quoted and the orders adopted by the defendant Commissioner of Agriculture and Markets pursuant thereto, on the ground that said statute and orders were arbitrary, unreasonable, oppressive and discriminatory and were in violation of the Fourteenth Amendment to the Constitution of the United States in that they deprived the plaintiff of its property without due process of law and in that they denied the plaintiff the

equal protection of the laws; and further to enjoin the defendants from proceeding in any manner against the plaintiff or any other person, firm, corporation or association by reason of the purchase or sale by them of the plaintiff's fluid milk in bottles under its trade name "Borden's" at a price as low as that at which the purchase or sale of fluid milk in bottles of any other milk dealer was authorized or permitted.

Equitable jurisdiction was established by reason of the inability of the plaintiff to obtain the license which it was required by law to obtain, unless the plaintiff should agree to comply with and obey the section of the statute complained of and the orders adopted pursuant thereto. Continuation of the plaintiff's business without first obtaining such license rendered the plaintiff and all milk dealers dealing with the plaintiff liable to the imposition of severe penalties and fines, and the officers, agents and employees of the plaintiff and of such milk dealers liable to imprisonment.

A temporary restraining order was granted pending the determination of the action enjoining the defendants from proceeding in any manner against the plaintiff or anyone dealing with the plaintiff by reason of the plaintiff continuing its business without obtaining the required license. A temporary injunction containing similar provisions was granted in the decree made July 5, 1934, pending the plaintiff's appeal therefrom.

The action was heard before Honorable Learned Hand, Circuit Judge, Honorable Henry W. Goddard and Honorable Alfred C. Coxe, District Judges, specially sitting as a Statutory Court convened pursuant to the provisions of Section 380 of Title 28 of the United States Code (Judicial Code, Section 266, amended). At the hearing plaintiff pressed its application for an interlocutory injunction and

certain of the defendants moved that the bill of complaint be dismissed. Thereafter, in conformity with an opinion delivered by Judge Hand, concurred in by the other members of the court, a final decree was made and entered denying the plaintiff's said application for an interlocutory injunction and dismissing the bill of complaint for want of equity.

VI.

The cases believed to sustain appellate jurisdiction are as follows:

Clark v. *Poor*, 274 U. S. 554 (1927);

Interstate Busses Corporation v. *Blodgett*, 276 U. S. 245 (1928);

Herkness v. *Irii* 278 U. S. 92 (1928).

Dated, July 12, 1934.

Respectfully submitted,

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15 *Broad Street, New York, N. Y.,*
Solicitors for Plaintiff.

(Sgd.) TIMOTHY N. PFEIFFER,
Of Counsel.